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IN THE

# Supreme Court of the United States

ENVIRONMENTAL CONSERVATION ORGANIZATION,

*Petitioner,*

*v.*

CITY OF DALLAS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitoner Environmental Conservation Organization timely filed a Clean Water Act ("CWA") citizen suit against Respondent City of Dallas. Thereafter, the City of Dallas separately negotiated and entered a Consent Decree settlement with the federal and state governments after the citizen suit had been pending for approximately two years.

Based on the Consent Decree, the district court and United States Court of Appeals for the Fifth Circuit dismissed the Environmental Conservation Organization's citizen suit. The questions presented for review therefore are as follows:

1. Whether it violates the plain language of the CWA to dismiss a timely, prior-filed citizen suit based on a belated consent decree settlement between the government and a CWA violator.

2. If a CWA citizen suit can be dismissed under the above circumstances, whether dismissal on grounds of mootness or res judicata is improper if the CWA violator fails to demonstrate its violations have ceased, or if there is a possibility the violations continue.

## CORPORATE DISCLOSURE STATEMENT AND LIST OF PARTIES

Pursuant to Supreme Court Rules 14.1(a) and 29.6, Petitioner Environmental Conservation Organization states it does not have a parent corporation, and no publicly held corporation owns 10% or more of the Environmental Conservation Organization.

In addition to the parties listed in the caption, the United States of America appeared as *amicus curiae* in the proceedings before the United States Court of Appeals for the Fifth Circuit.

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Petitioner Environmental Conservation Organization ("ECO") respectfully petitions the Court for a writ of certiorari, because its timely, prior-filed citizen suit was erroneously dismissed when the Respondent City of Dallas (the "City") entered into a Consent Decree with the government in a subsequent lawsuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008) and reproduced herein as Appendix ("Appx.") Exhibit A. The opinion of the district court is reported at *Environmental Conservation Organization v. City of Dallas*, 516 F. Supp. 2d 653 (N.D. Tex. 2007) and reproduced herein as Appx. Exhibit B.

## JURISDICTIONAL STATEMENT

The City continuously has violated requirements under the CWA since 1997. ECO therefore filed a CWA section 505, 33 U.S.C. § 1365, citizen suit against the City in the district court. The district court entered summary judgment on the grounds of res judicata, dismissing ECO's citizen suit on April 26, 2007. *See* Appx. Exhibit B. ECO appealed this dismissal to the United States Court of Appeals for the Fifth Circuit on May 17, 2007.

On May 27, 2008, the Fifth Circuit issued an opinion vacating the district court's summary judgment ruling and remanding this matter, but it also ruled ECO's citizen

suit be dismissed as moot. *See* Appx. Exhibit A. ECO did not seek rehearing of the Fifth Circuit's ruling, and it has not sought extensions of time to file its Petition for Writ of Certiorari in this Court.

Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review, on a writ of certiorari, the Fifth Circuit's May 27, 2008 judgment.

## STATUTE INVOLVED

The relevant statute in this matter is CWA section 505(a), 33 U.S.C. § 1365(a), which provides:

> (a) Authorization; jurisdiction
>
> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, . . . and to apply any appropriate

civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order . . . .

## STATEMENT OF THE CASE

### A. Implementation of the CWA

ECO is an environmental watch group the members of which are concerned with environmental health and wellbeing, including the health and wellbeing of lakes, streams, rivers, and other water bodies in the southwest United States.[1] The CWA and related regulations

[1] Record on Appeal ("ROA"), pp. 21, 84-87, 188, 189-192. As permitted by Supreme Court Rule 12.7, ECO cites the ROA maintained by the clerks of the lower courts.

impose standards and limitations regarding the discharge of materials and pollutants into such water bodies.

The United States Environmental Protection Agency ("EPA"), or a state acting on behalf of the EPA, implements the CWA, in part, by issuing municipalities a Separate Storm Sewer System Permit ("MS4 Permit").[2] A MS4 Permit dictates the manner in which municipalities must manage, monitor, and prevent discharges of pollutants into the municipalities' storm sewer systems, which often feed into surrounding water bodies.[3]

**B. The City Violated the CWA**

On March 28, 1997, the EPA issued the City MS4 Permit number TXS000701 (the "City's Permit").[4] The City's Permit was accompanied by a lengthy document known as a Storm Water Management Plan ("SWMP"), which sets forth in exacting detail several hundred ongoing "tasks" the City was obligated to complete to comply with its Permit and the CWA.[5]

Since the City's SWMP went into effect in 1997, the City has failed to fulfill myriad obligations found in the

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[2] *See generally* 33 U.S.C. § 1342; ROA, pp. 1938-1968.

[3] ROA, pp. 1938-1968.

[4] ROA, p. 1938.

[5] ROA, pp. 2127-2327.

SWMP.[6] The City also has engaged in the illicit discharge of pollutants into water bodies without a permit, also in violation of the CWA.[7]

### C. ECO's Original Notice Letter

After investigating the City's violations, ECO sent the City a CWA "Notice Letter" on September 8, 2003.[8] In the Letter, ECO advised the City of its ongoing CWA violations and informed it ECO would proceed with a CWA citizen suit if the violations were not remedied within sixty days of the Notice Letter.[9]

Pursuant to CWA regulations, ECO copied the Administrator of the EPA; the EPA regional office with responsibility for Texas; and the Texas Commission on Environmental Quality ("TCEQ"), Texas's state environmental agency. By statute, if the EPA or TCEQ had initiated an enforcement action by filing a civil or criminal action in federal or state *court* during the sixty-day notice period, ECO's citizen suit would have been preempted. *See* 33 U.S.C. § 1365(b)(1)(B). Neither the EPA nor the TCEQ initiated such an enforcement action during the notice period.[10]

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[6] ROA, pp. 26-46, 1644-1649, 1772-1783, 1816-1832, 1971-2056, 2060-2118, 2122-2124.

[7] ROA, pp. 26-46, 1644-1649, 1772-1783, 1816-1832, 1971-2056, 2060-2118, 2122-2124.

[8] ROA, pp. 152-153.

[9] ROA, pp. 152-153.

[10] ROA, p. 21.

## D. ECO's Revised Notice Letter

On October 9, 2003, approximately one month after ECO sent its original Notice Letter, ECO sent the City a revised Notice Letter.[11] ECO again notified the City of the CWA violations, including violations of approximately 150 specific sections of the City's SWMP.[12] ECO further notified the City that ECO would proceed with a CWA citizen suit if the City did not address these violations.[13] Once again, ECO copied the EPA Administrator, the EPA regional office with responsibility for Texas, and the TCEQ so the agencies would be aware of the City's violations.[14] Neither the EPA nor the TCEQ initiated an enforcement action within the sixty-day notice period, and no agency contacted ECO to signal an interest in investigating or prosecuting the City's violations.[15]

## E. The EPA Investigation

On November 19, 2003 (approximately two-and-a-half months *after* ECO sent the City and EPA the original Notice Letter and one-and-a-half months *after* ECO sent the revised Notice Letter), the EPA, without

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[11] ROA, pp. 154-171.

[12] ROA, pp. 154-171.

[13] *Id.*

[14] ROA, p. 156.

[15] ROA, p. 21.

ECO's knowledge, began investigating City facilities regarding the types of violations ECO identified in its Notice Letters.[16] The investigation did not constitute an enforcement action under the CWA citizen suit provision,[17] and the EPA did not otherwise institute an enforcement action during the sixty-day notice period.[18] The notice period therefore lapsed, which enabled ECO to move forward with a CWA citizen suit against the City.

### F. ECO's Citizen Suit

On December 9, 2003 (three months *after* ECO sent its original Notice Letter and two months *after* ECO sent the revised Notice Letter), ECO filed a citizen suit against the City under CWA section 505(a), 33 U.S.C. § 1365(a).[19] ECO asserted claims the City violated the requirements of its SWMP (the "SWMP claims") and that the City was engaging in the illicit discharge of pollutants into surrounding water bodies (the "illicit discharge claims").[20]

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[16] *See* "Appendix," filed May 11, 2006 (not independently numbered in the ROA), Exhibit 2, Cover Letter, p. 1 and Compliance Order, p. 12.

[17] *See, e.g., Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum*, 207 F.3d 789, 794-95 (5th Cir. 2000) (recognizing that government action short of an enforcement action in state or federal *court* will not preempt a citizen suit).

[18] ROA, p. 21.

[19] ROA, pp. 19-48.

[20] ROA, pp. 19-48.

## G. The City's Consent Decree

On February 6, 2004 (five months *after* ECO sent the City and EPA the original Notice Letter and approximately two months *after* ECO filed its citizen suit against the City), the EPA initiated an administrative action against the City by serving an administrative compliance order ("ACO") covering some of the City's CWA violations.[21] This administrative action was not a "court action" within the meaning of the CWA citizen suit provision,[22] and no further action was taken under the ACO.

On May 10, 2006 (more than two years *after* ECO filed its citizen suit and two-and-a-half years *after* ECO sent the City and EPA the original Notice Letter), the state of Texas (which later had become active in this matter), the United States Attorney, acting on behalf of the EPA (collectively, the "Government"), and the City formally agreed to settle the administrative proceeding against the City.[23] The parties memorialized their settlement in a Consent Decree.[24]

Also on May 10, 2006, the Government filed a separate CWA lawsuit in the district court against the

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[21] *See* "Appendix," filed May 11, 2006 (not independently numbered in the ROA), Exhibit 2.

[22] *See* n.17, *supra*.

[23] ROA, pp. 1603-1604, 1670-1715.

[24] *Id.*

City. On the same day, the Government lodged the Consent Decree in that lawsuit.[25]

The district court formally entered the Consent Decree on August 28, 2006. The Consent Decree was entered approximately three years *after* ECO sent the City and EPA the original Notice Letter; it was entered *after* ECO's citizen suit against the City had been pending for more than two-and-a-half years, and *after* ECO incurred hundreds of thousands of dollars in fees and costs prosecuting its CWA citizen suit against the City.[26]

## H. The City's Motion for Summary Judgment

On October 13, 2006, the City moved for summary judgment dismissal of ECO's remaining SWMP claims.[27] The City contended its Consent Decree either mooted ECO's claims or warranted dismissal under the doctrine of res judicata.[28] On April 26, 2007, the district court

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[25] *See* "Appendix," filed May 11, 2006 (not numbered in the ROA), Exhibit 3; ROA, pp. 1603-1604, 1670-1715.

[26] ROA, pp. 1710, 2478. ECO's claim for attorneys' fees and costs against the City was denied in the district court. The district court's ruling is on appeal to the Fifth Circuit in a case styled *Environmental Conservation Organization v. City of Dallas*, Appeal No. 07-11247.

[27] ROA, pp. 1590-1592. ECO's illicit discharge claims already had been dismissed for reasons not at issue. ROA, pp. 1425-1426.

[28] ROA, pp. 1590-1592.

issued a Memorandum Opinion and Order (*see* Appx. Exhibit B) granting the City's summary judgment motion on the grounds of res judicata, and the court simultaneously dismissed ECO's citizen suit.

## I. ECO's Appeal to the Fifth Circuit

ECO appealed the district court's dismissal of its citizen suit to the Fifth Circuit, pursuant to 28 U.S.C. § 1291. In the appeal, ECO contended: (1) strict construction of the CWA's citizen suit provision would not allow dismissal of a timely, prior-filed citizen suit based on a belated government lawsuit and consent decree, and (2) even if the CWA could be construed to allow dismissal under such circumstances, neither mootness nor res judicata could justify dismissal of ECO's citizen suit, because the City failed to prove its violations have ceased (or rebut affirmative evidence its violations continue).

The Fifth Circuit resolved the appeal by vacating the district court's holding that res judicata justified dismissal of ECO's citizen suit. Indeed, the Fifth Circuit acknowledged a split between the circuits regarding the proper application of res judicata to prior-filed citizen suits, and instead opted to resolve the appeal based on mootness.

The Fifth Circuit held ECO's citizen suit was moot. In so doing, the court applied a mootness standard that is not grounded in this Court's precedents, but based on a novel construction of mootness premised on questionable authorities from other circuits. The practical effect of the Fifth Circuit's holding is that it

excused the City form bringing forth actual evidence its violations had ceased as a pre-condition to dismissal.

ECO seeks review of the Fifth Circuit's holding, because this case was erroneously decided, and ECO's citizen suit should be allowed to proceed. ECO respectfully submits that resolution of these matters will require the Court to resolve misapplications of the CWA and conflicts between the circuits on controlling legal issues that jeopardize the objectives of the CWA.

## REASONS FOR GRANTING THE PETITION

### A. Introduction

The CWA has the vital policy objectives of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To ensure these objectives are accomplished, Congress created an enforcement scheme to ensure robust enforcement of the CWA through a cooperative relationship between the federal government, state governments, and private citizens. The CWA citizen suit provision, 33 U.S.C. § 1365, best reflects this delegation. Therein, Congress gave federal and state governments authority to institute civil or criminal actions to enforce CWA mandates, but in the absence of timely enforcement actions, granted private citizens unfettered authority to prosecute CWA citizen suits. *See generally* 33 U.S.C. § 1365(b).

Indeed, Congress's reverence and desire for the citizen enforcement mechanism is demonstrated in the CWA's legislative history, wherein Congress indicated,

"[c]ourts should recognize that in bringing legitimate actions under [the CWA] citizens would be performing a public service . . . ." S. REP. 92-414, at 72, reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

The Fifth Circuit's holding in this matter, and inconsistent authorities on relevant legal issues from various circuits, jeopardize the congressionally created enforcement scheme in the CWA. For instance, the Fifth Circuit held the plain language of the CWA citizen suit provision allows dismissal of a prior-filed citizen suit even when the government fails to bring a timely enforcement action as required by the CWA. This is contrary to the plain language of the CWA and diminishes a citizen's statutorily created right to prosecute a suit under the CWA.

Additionally, the Fifth Circuit held ECO's timely filed citizen suit was moot in light of the Government and City's belated Consent Decree, although the City never submitted evidence its CWA violations have ceased. The Fifth Circuit accepted the City's contention that its purportedly "involuntary" entry of the Consent Decree was evidence that mooted ECO's citizen suit. This reflects a new mootness standard that conflicts with this Court's precedents and established federal practice.

Finally, the Fifth Circuit chose not to address the proper application of res judicata in this case, but it noted that holdings from other circuits conflict regarding whether res judicata can justify dismissal of a prior-filed citizen suit without any factual evaluation regarding whether violations continue. The circuits that hold res

judicata should be applied mechanically to permit dismissal, without any factual inquiry, undermine the CWA's objectives to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters", 33 U.S.C. § 1251(a), and discourage robust enforcement of the CWA.

This Court has not, but should, settle these important issues and conflicts between the circuits, because Congress's intended operation of the CWA is at risk. Moreover, the issues are not merely academic; they directly bear on the merits of ECO's citizen suit and the impropriety of the lower courts' dismissal of the suit.[29]

### B. A Substantive Issue in this Case Will Be Resolved and the Public Interest Will Be Served if this Court Establishes whether the CWA should Be Applied Strictly to Protect Prior-filed Citizen Suits

The CWA authorizes the state and federal governments to institute enforcement actions against CWA violators. *See* 33 U.S.C. § 1365(b)(1)(B); 33 U.S.C. § 1319(b). Indeed, the state and federal governments

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[29] A corollary to these issues is the Fifth Circuit's holding that ECO's claims for civil penalties are moot. *See* Appx. Exhibit A, p. 22a. This implicates splits between the circuits and a conflict with this Court's precedents that should be resolved. *Compare Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990), *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696-97 (4th Cir. 1989), and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 192-94 (2000), *with* Appx. Exhibit A, pp. 21a-22a.

have the initial, though not exclusive, responsibility for enforcing the CWA, because CWA section 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), obligates private citizens to give states and the federal government sixty-days notice before filing a citizen suit.

If either level of government institutes an enforcement action *before* expiration of the notice period, a citizen suit is preempted. *See* 33 U.S.C. § 1365(b)(1)(B). The CWA's plain language makes clear, however, the federal and state governments must act timely to preserve their status as the initial enforcers of the CWA, because upon expiration of the sixty-day notice period, their enforcement authority becomes equally vested in private citizens. *Id.*

Here, the Government failed to initiate an enforcement action within the sixty-day notice period. Accordingly, consistent with the express language of the CWA, ECO brought its citizen suit against the City.

ECO followed the strict provisions for notice and timely sued the City. The district court and Fifth Circuit nevertheless held ECO's citizen suit should be dismissed based on entry of the Government's belated Consent Decree.

Authoritative guidance from the Court is necessary to resolve whether the lower courts' holdings are inconsistent with the express language of the CWA citizen suit provision, and the Court's prior rulings.

### 1. Congress Expressly Identified the Limitations on CWA Citizen Suits

It is well settled that the express language of a statute is the best evidence of congressional intent. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) ("only the most extraordinary showing of contrary intentions . . . would justify a limitation on the 'plain meaning' of the statutory language."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

Accordingly, ECO has relied on the express language of the CWA citizen suit provision, which provides only for the following limited restraints on a private citizen's right to prosecute a CWA citizen suit: (1) the citizen must give sixty-days' notice of the alleged violation *before* filing suit, and (2) the citizen cannot file suit *after* the EPA Administrator or a state government has commenced and is diligently prosecuting a suit against a CWA violator. *See* 33 U.S.C. § 1365(b)(1).

Congress imposed no further limitations on a citizen's right to prosecute a citizen suit. *Id.* Accordingly, ECO contends the plain language of the citizen suit provision precludes courts from employing judicially created mootness or res judicata doctrines to reach a contrary result.

Rules of statutory construction should compel this conclusion, because courts "'are not at liberty to create an exception where Congress has declined to do so.'"

*Freytag v. Comm'r*, 501 U.S. 868, 874 (1991) (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)). Moreover, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (quoting *Raleigh & Gaston R.R. Co. v. Reid*, 20 L. Ed. 570 (1872)).[30]

Indeed, courts "should be circumspect in adopting doctrines that have even the appearance of disturbing a congressional balance of remedies." *N.W. Power Prods., Inc. v. Omark Indus.*, 576 F.2d 83, 90 (5th Cir. 1978). Although "federal courts have power to construe and apply the laws of Congress, they have no power to rewrite, expand, or contract them." *Liberty Mut. Ins. Co. v. Horton*, 275 F.2d 148, 153 (5th Cir. 1960).

### 2. Case Authorities Embrace Strict Application of the CWA Citizen Suit Provision

In light of the foregoing legal principles, dismissal of a properly filed citizen suit because of belated government action is contrary to the CWA's plain language and Congress's corresponding intent. One federal district court has recognized as much by holding:

> Section 1365 clearly provides that a citizen's suit can be commenced if the government does

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[30] ECO contends the citizen suit provision limits the manner in which government action can supersede or usurp a citizen suit. To conclude otherwise requires the assumption that Congress, which carefully defined when a citizen will be vested with authority to enforce the CWA, legislated by omission when that authority can be diminished.

> not file its own lawsuit within sixty days of the citizen's notice of its intent to do so. If Congress had intended a citizen's suit to be dismissed *when the government took initiative against the polluter at any subsequent time, it could have written the citizen's suit provision that way.*

*Natural Res. Def. Council, Inc. v. Loewengart & Co.*, 776 F. Supp. 996, 1000 (M.D. Pa. 1991) (emphasis added). Likewise, in *Altamaha Riverkeepers v. City of Cochran*, a district court recognized that under a plain reading of the CWA's statutory language, a subsequent consent decree does not bar a prior-filed citizen suit. 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2001).

Another trial court addressed this issue in *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fla. 1987). There, the court held that a later-executed consent decree did not warrant dismissal of a prior-filed citizen suit, even though the settling parties to the consent decree (the government and a CWA violator) actually had their suit consolidated with the prior-filed citizen suit. *Id.* at 1557. The court reached this holding *after* it held (in the same opinion), it was going to enter the consent decree between the government and CWA violator. *Id.*

### 3. Jurisprudence Is Not Consistent Regarding whether the Citizen Suit Provision Should Be Applied Strictly

Despite such authority, and given the absence of authoritative guidance from this Court, no consistent jurisprudence has evolved regarding whether the CWA's

plain language should be applied strictly to protect prior-filed citizen suits. For instance, the district court in this case called into question the holdings in both *Natural Resources Defense Council* and *Altamaha Riverkeepers*, because the district court did not believe the holdings accounted for the purportedly "preclusive effect" of a belated, court-entered consent decree. *See* Appx. Exhibit B, p. 38a.

This position is not supported by a close reading of the cases. In *Natural Resources Defense Council*, a CWA violator negotiated a consent decree with the government *after* a private citizen filed a timely CWA citizen suit. 776 F. Supp. at 999-1000. The CWA violator therefore contended the later-executed consent decree necessitated dismissal of the prior-filed citizen suit. *Id.*

The court in *Natural Resources Defense Council*, however, was not indifferent to preclusive effect; rather, it offered a general principle of law that applied regardless whether a consent decree had been entered. This contention appears accurate because the court reached its holding only after rejecting the holding from *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991).

In *Atlantic States Legal Foundation, Inc.*, the Court of Appeals for the Second Circuit dismissed a prior-filed citizen suit because the CWA violator in that case entered a settlement and related criminal plea agreement that was entered as a final judgment. *See* 933 F.2d at 126. When the court in *Natural Resources Defense Council* analyzed the holding from *Atlantic States Legal Foundation, Inc.*, it did not give any

indication the settlement or plea agreement in *Atlantic States Legal Foundation, Inc.* changed the analysis whether subsequent government action bars a prior-filed citizen suit.

The *Natural Resources Defense Council* court rejected the holding, because regardless of the status of a later-executed settlement or similar agreement: "If Congress had intended a citizen's suit to be dismissed when the government took initiative against the polluter at any subsequent time [to the notice period], *it could have written the citizen's suit provision that way*." 776 F. Supp. at 1000 (emphasis added).

Similarly, in *Altamaha Riverkeepers*, although a consent decree had been proposed to resolve the case, the court held: "although the [state environmental agency] has now proposed a Consent Order and fined the [defendant] for noncompliance with its [CWA] permit, those actions do not bar this citizen suit." 162 F. Supp. 2d at 1373. The court in *Sierra Club v. Coca-Cola Corp.* did not attribute "preclusive effect" to the consent decree in that case either, because the court approved entry of the consent decree in the same opinion in which it authorized the prior-filed citizen suit to proceed. 673 F. Supp. at 1557.

Based on these authorities, and a plain reading of the CWA, ECO contends later government action cannot justify dismissal of a prior-filed citizen suit. Admittedly, it would be appropriate for a judge in the prior-filed citizen suit to be made aware of and understand the terms of a related consent decree when fashioning relief. *See, e.g., Natural Res. Def. Council*, 776 F. Supp. at 1000

(adopting the position that "any overlap with the [government] proceedings can be handled at the remedial stage of [a prior-filed] lawsuit when the penalties and other provisions of the [government's] consent decree can be coordinated with whatever relief . . . order[ed in the citizen suit]."). [31] However, the foregoing authorities nonetheless stand for the proposition that the CWA citizen suit provision should be construed strictly, and in accordance with its plain language, which prohibits dismissal of a prior-filed citizen suit.

### 4. A Decision by this Court Will Resolve the Substantive Issues in this Case and Broader Public Interest Concerns

The proceedings below make clear that courts do not have a uniform view on this matter. CWA plaintiffs, therefore, have no clear guidance at the outset of CWA citizen suits whether belated government action may retroactively preempt their prior-filed suits. This injects far too much uncertainty into the operation of the CWA's citizen suit provision. This uncertainty is not consistent with the reverence Congress displayed for citizen enforcement of the CWA when it admonished that "[c]ourts should recognize that in bringing legitimate actions under [the CWA] citizens would be performing a public service . . . ." S. REP. 92-414, at 72, reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

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[31] This approach reconciles a strict application of the CWA's plain language with the constitutional mootness concerns the Fifth Circuit raised in its opinion in this case. *See* Appx. Exhibit A, p. 12a.

It is essential to appreciate that CWA plaintiffs' uncertainty regarding whether later-government action might undermine their prior-filed citizen suit is not tantamount to the uncertainty all litigants face when initiating lawsuits. CWA plaintiffs, unlike litigants in general, do not sue for their personal interests. Instead, CWA plaintiffs accommodate Congress's appeal for private citizens to undertake a private burden and potentially, as was the case here, incur considerable expense, to prosecute suits in the public interest.

Congress even attempted to incentivize private citizen enforcement with a fee-shifting provision in the CWA. *See* 33 U.S.C. § 1365(d) ("The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party . . . ."). Contrary to this congressional incentive and appeal for private enforcement of the CWA, subjecting potential CWA plaintiffs to uncertainty because of the unsettled state of the law will operate as disincentive for them to prosecute citizen suits.[32]

ECO respectfully requests the Court to allow the writ in this matter and provide authoritative guidance regarding whether the CWA's citizen suit provision should be applied strictly to protect prior-filed citizen

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[32] This is compounded by authorities that hold CWA plaintiffs cannot recover attorneys' fees when belated government action leads to dismissal of their prior-filed citizen suits. *See, e.g., Environmental Conservation Organization v. City of Dallas*, No. 3-03-CV-2951-BD, 2007 WL 4165917, *2 (N.D. Tex. November 20, 2007).

suits. Otherwise, citizen enforcement of the CWA will be jeopardized by uncertainty regarding operation of the citizen suit provision, and Congress's desire for robust enforcement of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), will be thwarted.

### C. The Fifth Circuit's Mootness Standard Conflicts with Controlling Authorities and Was the Basis for the Erroneous Dismissal of ECO's Citizen Suit

The Fifth Circuit improperly adopted a new mootness standard. Mootness is grounded in the constitutional principle that federal courts have jurisdiction over only actual cases and controversies. *See Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987). The Court, with apparent uniformity, has treated mootness similar to an avoidance or affirmative defense; accordingly, a defendant has the burden to prove mootness when parties dispute whether a continuing case or controversy can sustain a suit.[33]

For instance, in *United States v. W.T. Grant Co.*, this Court held: "The case may nevertheless be moot if the *defendant can demonstrate* that there is no reasonable expectation that the wrong will be repeated." 345 U.S.

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[33] ECO is not suggesting that mootness, like affirmative defenses, can be waived if not pleaded. ECO only notes that this Court historically has placed the burden of proving mootness on defendants, which is similar to the burden defendants have to prove affirmative defenses.

629, 633 (1953) (emphasis added). In *United States v. Concentrated Phosphate Export Ass'n*, this Court held that it was a defendant's obligation to bring forth evidence that a lawsuit was moot. 393 U.S. 199, 203 (1968).

In *Gwaltney of Smithfield, Ltd.*, the Court held: "In seeking to have a case dismissed as moot . . . *the defendant's burden 'is a heavy one.'* . . . . *The defendant must demonstrate* that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 484 U.S. at 66 (quoting *W.T. Grant Co.*, 345 U.S. at 633 and *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. at 203) (emphasis added).

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court held: "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." 528 U.S. at 189 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (emphasis added).[34]

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[34] The only discernible exception to this principle appears to be that the Court has dismissed suits as moot when both parties to the suit *concede* the underlying illegal conduct ceased. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) ("*all parties agree* that [plaintiff] is now entitled to [the relief he requested]. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it.") (emphasis added). Here, by contrast, ECO has been adamant that the un-rebutted summary judgement evidence illustrates the City's violations are ongoing, and ECO never has conceded the Consent Decree resolves the City's violations.

Notwithstanding these authorities, the Fifth Circuit, purportedly following holdings from the Second and Eighth Circuits,[35] has formulated a new mootness standard. The Fifth Circuit places the burden on plaintiffs to anticipatorily rebut the application of mootness, even when a defendant has not propounded evidence raising the prospect of mootness. This new standard is not consistent with, nor grounded in, this Court's precedents or federal practice.[36]

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[35] *See Atl. States Legal Found., Inc.*, 933 F.2d at 128; *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998).

[36] The Fifth Circuit's adoption of this novel standard in this case is particularly troubling, because the court reviewed the summary judgment record and concluded ECO's summary judgment evidence was probative of the City's past CWA violations, but not ongoing violations. *See* Appx. Exhibit A, pp. 17a-18a. In reaching this conclusion, the court overlooked that at the time ECO submitted its summary judgment evidence in November 2006, the evidence reflected the City's CWA violations existed before and after suit was filed. The Fifth Circuit therefore should have viewed the summary judgment evidence from a retroactive perspective, not from the perspective that existed when the Fifth Circuit issued its opinion in this matter over a year after ECO submitted its summary judgment evidence. The Fifth Circuit also overlooked that even *after* the Consent Decree was entered, the City failed to produce in discovery compliance documents ECO requested, which should have existed if the City had been complying with the CWA. *See* ROA, p. 1645. The absence of these compliance documents was probative of the City's ongoing non-compliance. These issues go to both the impropriety of the Fifth Circuit's ruling (i.e. as the non-movant, ECO was entitled to have all

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### 1. Controlling Authorities Do Not Support the Fifth Circuit's Rule that Plaintiffs Must Anticipatorily Rebut Mootness

In the lower courts, ECO contended that the City, not ECO, had the burden of proof regarding mootness.[37] This was particularly so given the City raised mootness as a basis for summary judgment dismissal of ECO's citizen suit.

It is well settled that the party moving for summary judgment has the initial burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This is reinforced by the fact that the City treated mootness as an affirmative defense and even amended its Answer in ECO's citizen suit to assert the defense after the Consent Decree was entered.[38]

Notwithstanding that proper application of this Court's precedents and the rules of practice excused ECO from any obligation to anticipatorily rebut mootness, ECO submitted evidence of the City's ongoing CWA violations in the summary judgment record.[39]

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facts and inferences resolved in its favor, *see Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 540 (5th Cir. 2005)) and an unsettled matter regarding the proper method of appellate review in cases of this kind.

[37] *See* ROA pp. 1634, 1638, 1640, 1643-44.

[38] *See* ROA, pp. 1530-1542, 1573.

[39] *See* ROA, pp. 1644-1649.

Ongoing violations demonstrate not only that a defendant's violations have not ceased, but also, that they may recur. *Cf. Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743, 764-65 (7th Cir. 2004). Even in the face of this evidence, the City never submitted any rebuttal evidence to demonstrate its CWA violations had ceased.[40] The City instead offered the conclusory contention that its Consent Decree operated as proof the City's violations had ended as a matter of law.[41]

Proper respect for this Court's precedents and the rules of pratice should have compelled the Fifth Circuit to reject the City's unsubstantiated mootness claim. Instead, the Fifth Circuit followed the Second and Eighth Circuits and adopted an entirely new principle of mootness whereby ECO purportedly had the burden to anticipatorily rebut the application of mootness by "prov[ing] that there is a realistic prospect that the violations alleged in its complaint [would] continue notwithstanding the [C]onsent [D]ecree." *See* Appx. Exhibit A, p. 15a.

### 2. The Second, Fifth, and Eighth Circuits Misread this Court's Precedents Regarding the Operation of Mootness

The Fifth Circuit adopted the foregoing, novel mootness doctrine by relying on the Eighth Circuit's holding in *Comfort Lake Ass'n v. Dresel Contracting,*

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[40] *See* ROA, pp. 1640-1644.

[41] *See, e.g.*, ROA pp. at 2414.

which had been based on language from the Second Circuit's holding in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.* The Fifth Circuit read these opinions to stand for the proposition that when a defendant "voluntarily" ceases illegal conduct while a CWA citizen suit is pending, the mootness principles historically articulated by this Court apply (i.e. the defendant has the heavy burden of establishing it is absolutely clear its wrongful conduct could not reasonably be expected to recur).[42] If, however, the defendant ceases illegal conduct because of what the Fifth Circuit apparently considers "involuntary" means (i.e. by entry of a consent decree), then according to the Fifth Circuit, a less stringent mootness standard should apply, which imposes the burden on a plaintiff to anticipatorily rebut the application of mootness.[43]

The Fifth Circuit applied the less stringent standard in this case, reasoning that the City did not "voluntarily" discontinue its CWA violations. According to the Fifth Circuit, the City was compelled, "involuntarily," to discontinue the violations by its Consent Decree with the Government.

This voluntary versus involuntary dichotomy is not in keeping with this Court's precedents. Although this Court often has discussed mootness in factual contexts where a defendant voluntarily discontinued illegal conduct, the Court never has held a voluntary versus involuntary dichotomy (in the manner the Fifth Circuit

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[42] Appx. Exhibit A, pp. 13a-14a.

[43] *Id.*

uses the concept) is relevant to the application of the mootness doctrine. The most compelling evidence of this is the Court's holding in *Friends of the Earth, Inc. v. Laidlaw Environmental.*

In *Laidlaw*, a CWA defendant (as did the City here) entered into a settlement with a governmental agency and accepted civil penalties as punishment for CWA violations. 528 U.S. at 176-77. Indeed, the CWA defendant actually initiated communications with the agency and proposed the settlement and civil penalties precisely because it wanted to preempt a CWA plaintiff's citizen suit. *Id.* at 176.

On appeal, the United States Court of Appeals for the Fourth Circuit held these facts demonstrated a later-filed citizen suit should have been dismissed as moot. *Id.* at 179. This Court reversed the Fourth Circuit, not based on mootness principles purportedly contingent on whether the CWA defendant voluntary or involuntary discontinued its CWA violations, but because the Court found the defendant failed to satisfy *its* burden to prove mootness. *Id.* at 193-94.[44]

Notwithstanding the CWA defendant in *Laidlaw* (like the City here) was compelled to comply with the CWA by virtue of its settlement with the government, this Court did not shift the burden regarding mootness to the CWA plaintiff. The plaintiff's suit was not moot

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[44] Not even the undisputed fact that the CWA defendant closed the facility that was the source of the CWA violations was sufficient, in itself, to establish mootness as a matter of law. 528 U.S. at 193-94.

absent evidence *from the defendant* that violations had ceased.

*Laidlaw* confirms the lack of a basis in this Court's precedents for the Second, Fifth, and Eighth Circuits' holdings that the mootness standard may vary contingent upon whether a change in a defendant's conduct is voluntary versus involuntary. This Court simply has not employed or endorsed the "involuntary" concept in the manner the Fifth Circuit has held, nor has it ruled entry of a consent decree, standing alone, is conclusive proof a defendant's violations have ceased. There is no discernable basis for shifting a defendant's historical burden of establishing mootness to a plaintiff, or for the proposition that a case is moot without an affirmative showing by a CWA defendant that its violations have ended.

### 3. Resolution of the Proper Mootness Standard Is Essential to Resolution of this Case and Proper Enforcement of the CWA

It is telling that in *Atlantic States Legal Foundation, Inc.*, purportedly the origin of the voluntary versus involuntary dichotomy, the Second Circuit neither cited authority from this Court nor expressly articulated its intent to create a modified rule for mootness. In fact, it is doubtful the Second Circuit even intended to signal a change in the law. The Second Circuit began its analysis of the mootness doctrine by citing the historical formulation of the doctrine embraced by this Court: "If the state enforcement proceeding has caused the violations alleged in the citizen suit to *cease*

*without any likelihood of recurrence* . . . we believe that the citizen action must be dismissed." 933 F.2d at 128 (emphasis added).

Only in the Second Circuit's factual application of the mootness doctrine did it use, loosely, language the Eighth and Fifth Circuits ostensibly read as a new standard for cases of this kind:

> A citizen suing pursuant to Section 505 of the Act thus may not revisit the terms of a settlement reached by competent state authorities without regard to the probability of a continuation of the violations alleged in its complaint. Nor may the citizen suit proceed merely for the purpose of further investigating and monitoring the state compromise *absent some realistic prospect of the alleged violations continuing.*

*Id.* at 127-28 (emphasis added).

It depends on an exceedingly slender reed to construe this language as supporting a new mootness standard, because in a later portion of its opinion, the Second Circuit reined in any arguable modification of the law when it again alluded to this Court's historical mootness standard: "Nevertheless, there has been no express finding in the instant matter that the settlement between [the CWA defendant] and the [government] *has caused the violations alleged by [plaintiff] to cease and eliminated any realistic prospect of their recurrence.*" *Id.* at 128 (emphasis added).

Nothing in this language suggests the standard for mootness or the burden of proof regarding it was being shifted to the plaintiff.[45] The Eighth Circuit, and now the Fifth Circuit, nevertheless have created this judicial hybrid. As such, it appears at least two circuits have adopted a new mootness standard that conflicts with this Court's precedents.[46]

Resolution of this issue is essential for three reasons. First, it will resolve whether ECO's citizen suit was dismissed erroneously, because under this Court's mootness standard, the City was not entitled to summary judgment because *it* never submitted actual evidence demonstrating it is absolutely clear its CWA violations could not reasonably be expected to recur. Second, resolution will eliminate uncertainty for potential CWA plaintiffs by providing clear guidance on

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[45] In a subsequent opinion, the Second Circuit analyzed the effect of a later-executed consent decree on a prior-filed suit and appeared to adhere to the historical mootness principles whereby a CWA defendant has the heavy burden to prove mootness by showing that "there is no reasonable expectation that the wrong will be repeated." *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1018-19 (2d Cir. 1993).

[46] ECO notes that in *Kennedy Building Associates v. Viacom, Inc.*, the Eighth Circuit, without explanation, appears to retreat from its position that plaintiffs have the burden to disprove mootness when a defendant is compelled to discontinue illegal conduct by operation of a government settlement. 375 F.3d 731, 745 (8th 2004). A state statute, as opposed to the CWA, was at issue in *Kennedy Building Associates*, but it is not at all clear how this justified the Eighth Circuit's apparent retreat from its modified mootness standard. This reinforces that the state of the law on this point is highly uncertain.

whether a mootness standard can retroactively undermine plaintiffs' citizen suits, and which mootness standard plaintiffs will have to overcome to sustain citizen suits.

Finally, the Court will have the opportunity (not taken by the Second, Fifth, or Eighth Circuit) to consider two fundamental issues regarding the operation of mootness, in the context of Congress's intended operation of the CWA. The Court will be able to resolve whether a modified mootness standard will impose an increased burden on citizen suit plaintiffs to a degree that conflicts with Congress's intent to incentivize private enforcement of the CWA. Bound up in this determination is the degree to which the plain language of the CWA will be followed in the face of belated government action. Additionally, the Court can resolve whether a burden-shifting policy could have a chilling effect on private enforcement in a manner that will undermine the CWA's objectives to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

### D. A Substantive Issue in this Case and a Conflict between the Circuits Will Be Resolved if this Court Establishes the Proper Application of Res Judicata to Prior-Filed Citizen Suits

Res judicata conventionally applies when. "(1) the parties are identical or in *privity*; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions." *Test Masters*

*Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (emphasis added). Circuit courts have split regarding proper application of res judicata to prior-filed CWA citizen suits.[47]

### 1. The Seventh Circuit Applies Res Judicata in a Manner Consistent with the CWA's Objectives

In *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, the Seventh Circuit tailored the elements of res judicata to achieve effective enforcement of the CWA. 382 F.3d at 743. The Seventh Circuit formulated the "privity" requirement for purposes of prior-filed citizen suits, such that the requirement is satisfied only if a later-executed consent decree was the product of the government's "diligent prosecution." *Id.* at 757, 759. The Seventh Circuit used the diligent prosecution requirement to strike a balance between the policy objectives of the CWA and the principles of judicial economy and avoidance of duplicative litigation embodied in the res judicata doctrine.[48]

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[47] Although the Fifth Circuit did not decide this matter based on res judicata, ECO addresses the doctrine, because the City asserted it as an alternative basis for dismissal.

[48] This hardly is a radical departure from the operation of the res judicata doctrine, which long has been subject to the principle that "[e]ven when the prior decision is made in a judicial . . . forum neither res judicata nor collateral estoppel is rigidly applied. Both defenses must be qualified or rejected *when their use would contravene an overriding public policy or*

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For instance, the Seventh Circuit held that "diligent prosecution" in the CWA context requires an analysis of several factors, including whether the object of a consent decree is only the eventual reduction of violations, or the elimination of the violations altogether. 382 F.3d at 759, 763-64. Evidence the consent decree will not actually eliminate the underlying violations or that violations persist despite the consent decree is not consistent with diligent prosecution. *See id.* at 763-64.

Accordingly, when the Seventh Circuit applied res judicata, it did not analyze the "compliance" issue by considering a settlement agreement in a vacuum, or in the abstract. The court expressly noted: "we think a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." *Id.* at 760. The Seventh Circuit looked to real-world circumstances in which the settlement was executed and the CWA violator's actual, past conduct. *Id.* at 760.

Based on this construction of res judicata, a consent decree purportedly covering violations at issue in a

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*result in manifest injustice." Garner v. Giarrusso*, 571 F.2d 1330, 1336 (5th Cir. 1978) (emphasis added). Here, the policy that must prevail is Congress's commitment to restoring and maintaining the Nation's waters as reflected in the CWA's citizen suit provision. This policy is placed in jeopardy by conflicting opinions from circuit courts discussed below.

prior-filed citizen suit is not necessarily res judicata as to the suit. 382 F.3d at 760. The Seventh Circuit applied this principle by holding:

> Under the circumstances of this case [in which violations persisted over many years], we cannot say that simply throwing more money at the problems and taking an inordinately long time to determine if enough money was thrown at the problems to solve them this time around are actions calculated in good faith to bring about compliance with the Act. The record to date does not inspire confidence that effective and timely action will be taken to address problems of long standing. While the 2002 Stipulation will hopefully result in fewer and smaller violations after the mandated projects are completed, it is still, when all is said and done, a stalling tactic rather than a compliance strategy. As such, *we cannot say that it is a diligent prosecution, and we cannot uphold the district court's determination that res judicata bars the plaintiffs' suit.*

*Id.* at 764-65 (emphasis added).

### 2. Other Circuits Do Not Embrace the Proper Res Judicata Standard

Not all circuits apply the res judicata standard in a manner that accounts for congressional objectives to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

33 U.S.C. § 1251(a). For instance, although the Fifth Circuit declined to resolve the proper application of res judicata in its opinion in this case, it nonetheless acknowledged a spilt between the circuits on the issue:

> ECO argues that the common law doctrine of res judicata cannot be applied to CWA citizen suits, and there is some precedent to that effect. *See Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fla. 1987). The City points to later authority that disagrees. *See EPA v. City of Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990). Even were we to resolve that argument in the City's favor, *we would still face an apparent circuit split regarding the proper "privity" analysis in the context of determining the preclusive effect of an EPA-negotiated consent decree on a prior-filed CWA citizen suit. Compare Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743 (7th Cir. 2004) . . . *with City of Green Forest*, 921 F.2d at 1394 . . . ; *see Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473 (6th Cir. 2004) (expressly rejecting "diligent prosecution" requirement when applying res judicata to a prior-filed Clean Air Act citizen suit).

Appx. Exhibit A, p. 9a (emphasis added).[49]

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[49] Likewise, the district court noted the split between the circuits on this point, siding with the Sixth and Eighth Circuits, (Cont'd)

Moreover, when the district court analyzed res judicata in this case, it held, contrary to the standard established in *Friends of Milwaukee's Rivers*, that a government settlement is presumed to be diligent prosecution (i.e. sufficient to end CWA violations) as a matter of law.[50] The district court actually cited *Friends of Milwaukee's Rivers* in support of its holding, despite the Seventh Circuit's admonition: "we think a diligent prosecution analysis requires more than mere

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which do not embrace the res judicata standard applied by the Seventh Circuit:

> The Seventh Circuit is the only appellate court to suggest that "diligent prosecution" is a necessary element of privity. *See Friends of Milwaukee's Rivers*, 382 F.3d at 760 . . . . Other courts have expressly held that the "diligent prosecution" requirement only limits the ability of a citizen to file suit after "the [EPA] Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." *See* 33 U.S.C. 1365(b)(l)(B). *"Diligent prosecution" does not appear to be a factor in determining whether res judicata precludes a citizen from continuing to prosecute an earlier-filed enforcement action after entry of a consent decree in a subsequent case brought by the government.* [*See Ellis*, 390 F.3d at 473; *City of Green Forest*, 921 F.2d at 1403-04].

Appx. Exhibit B, pp. 39a-40a, n.5 (emphasis added).

[50] Appx. Exhibit B, p. 40a.

acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement." 382 F.3d at 760.

The district court declined to consider the evidence demonstrating violations were ongoing despite the Consent Decree, and instead settled on the presumptive diligent prosecution standard articulated, in different contexts, by the United States Court of Appeals for the Tenth Circuit and several federal district courts.[51] The foregoing illustrates there is a split between the circuits regarding whether res judicata should be subject to a fact-based inquiry focusing on whether CWA violations will continue, or a mechanical application that allows dismissal of prior-filed citizen suits despite the absence of evidence violations will cease.

### 3. Resolution of the Circuit Split Is Essential to Resolution of this Case and Proper Enforcement of the CWA

The conflicting holdings from the Sixth and Eighth Circuits potentially empower courts to dismiss prior-filed citizen suits even in the face of continuing CWA violations. CWA plaintiffs therefore have no clear guidance at the outset of a CWA citizen suit whether, and under what circumstances, belated government action may retroactively preempt their timely noticed and prior-filed actions. This injects uncertainty into the

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[51] *See* Appx. Exhibit B, pp. 39a-40a (citing, *inter alia*, the Tenth Circuit's holding in *Karr v. Hefner*, 475 F.3d 1192, 1197-98 (10th Cir. 2007)).

operation of the CWA's citizen suit provision, and penalizes CWA plaintiffs even when they bring legitimate actions against CWA violators. Both results threaten to undermine Congress's efforts to encourage citizen enforcement of the CWA.

Mechanical application of the res judicata doctrine, as the Sixth and Eighth Circuits appear to mandate, also creates considerable risk that the CWA will not operate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), because bona fide citizen suits will be dismissed without regard to whether CWA violations continue to threaten the Nation's waters. Authoritative guidance from this Court is necessary to resolve both the merits of ECO's citizen suit and whether the mechanical application of res judicata, or the fact-based application, is consistent with the public interest Congress sought to serve by enacting the CWA.

## CONCLUSION

The district court and Fifth Circuit have re-written the CWA citizen suit provision, or otherwise disregarded relevant principles, to permit untimely government action to supplant a timely, prior-filed citizen suit. The result is Petitioner Environmental Conservation Organization's rights under the CWA have been abrogated, and Congress's intended operation of the CWA has been put in jeopardy. Petitioner Environmental Conservation Organization therefore respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

## APPENDIX EXHIBIT A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 27, 2008

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10583

ENVIRONMENTAL CONSERVATION ORGANIZATION,

Plaintiff – Appellant,

v.

CITY OF DALLAS,

Defendant – Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before DAVIS and SOUTHWICK, Circuit Judges, and DRELL, District Judge.*

SOUTHWICK, Circuit Judge:

The Environmental Conservation Organization appeals the dismissal of its Clean Water Act citizen suit against the City of Dallas, Texas, arguing that the

* District Judge of the Western District of Louisiana, sitting by designation.

district court erroneously concluded that its suit was barred under the doctrine of res judicata. We agree that the citizen suit should have been dismissed, but not for the reasons given by the district court. We hold that the citizen suit became moot prior to the district court's entry of final judgment; therefore, we vacate the judgment because it was rendered without jurisdiction.

## I. Facts and Procedural Background

The City of Dallas, Texas ("City"), operates a municipal separate storm sewer system ("MS4") that collects, channels and discharges storm water runoff into the Trinity River and its tributaries. The City operates this separate storm sewer system pursuant to a Clean Water Act permit (the "MS4 Permit"). *See* 33 U.S.C. § 1342. The MS4 Permit delineates permissible and impermissible discharges into the Trinity River watershed and mandates the implementation of a storm water management program ("SWMP"). The SWMP imposes planning and monitoring requirements to ensure that non-storm water and other pollutants are not discharged through the separate storm sewer system. *See* 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26.

The Environmental Conservation Organization ("ECO") is a non-profit environmental watch group based in Dallas, Texas. Some of ECO's members use the Trinity River and its tributaries for recreational purposes. In September 2003, due to problems with the City's operation of its separate storm sewer system and the polluted appearance of some Dallas-area water

bodies, ECO notified the City that it would file a citizen suit in order to remedy alleged violations of the MS4 Permit and the Clean Water Act ("CWA" or "Act"). In accordance with the requirements of the CWA citizen-suit provision, ECO simultaneously notified the Administrator of the Environmental Protection Agency (EPA) and the Texas Commission on Environmental Quality ("TCEQ") of the alleged violations and ECO's intent to initiate a citizen suit against the City if no corrective action was taken. *See* 33 U.S.C. § 1365(b). In October 2003, ECO sent a revised notification letter to the City, the EPA Administrator and the TCEQ, pressing its concerns regarding the alleged violations and reiterating its intent to bring a citizen suit.

In December 2003, over sixty days after sending notice of the alleged violations, ECO filed a CWA citizen suit against the City in federal district court. ECO's complaint alleged that illicit pollutant discharges from various City-owned facilities violated both the MS4 Permit and the CWA (because they constituted discharges from point sources without a permit). The complaint also alleged that the City violated its MS4 Permit by failing to comply with the SWMP requirements contained therein. ECO sought civil penalties and injunctive relief under the CWA.

While neither the EPA nor the State of Texas commenced an enforcement action against the City prior to ECO's filing this suit, the EPA had begun to

investigate the City's separate storm sewer system.[1] In February 2004, the EPA issued an administrative compliance order that identified various violations of the City's MS4 Permit and the CWA. *See* 33 U.S.C. § 1319(a). The compliance order instructed the City to rectify these violations or arrange a "show cause" meeting with the EPA in order to explain why no enforcement action should be taken in regards to the alleged violations. Shortly after the order was issued, the City and the EPA began negotiating a settlement of the violations noticed therein. The EPA encouraged ECO to participate in the settlement discussions, but ECO declined. Ultimately, the City reached a settlement with the EPA.

In May 2006, the EPA, joined by the State of Texas, filed a CWA enforcement action against the City in federal district court (the "EPA enforcement action"). On the same day, EPA filed a proposed consent decree that contained the terms of the settlement agreement. The filing of the consent decree triggered a public notice and comment period, during which ECO was the only person or organization to submit comments. *See* 28 C.F.R. 50.7. ECO did not oppose entry of the consent decree, but expressed concern that the punitive provisions and some remedial provisions were inadequate. At the close of the public comment period, the EPA responded to ECO's comments and moved for entry of the consent decree. In August 2006, the district

1. It appears that EPA's first physical "inspections" of the City's separate storm sewer system occurred in November 2003. However, EPA asserts that it began reviewing certain reporting documents filed by the City as early as July 2003.

court granted EPA's unopposed motion to enter the consent decree. *See United States v. City of Dallas*, No. 3:06-cv-00845 (N.D.Tex. Aug. 28, 2006).[2]

The consent decree is a lengthy and detailed document. It requires, among other things, that the City pay $800,000 in civil penalties, undertake supplemental environmental projects totaling at least $1.2 million, meet minimum staffing requirements in its environmental quality and sewer system monitoring departments, and provide ongoing compliance reports to the EPA. The City is also subject to an audit of its storm water system within three years of the consent decree's entry and must pay stipulated penalties if it is found to be in violation of any of its provisions. The decree's appendices provide strict timetables for satisfaction of these provisions, which are posted on a website and available to the public.

During the time in which EPA was investigating and negotiating with the City, ECO's citizen suit remained pending on the district court's docket. After entering the consent decree in the EPA enforcement action, the district court directed the City to file a motion for summary judgment in ECO's action so that the court could determine whether the consent decree precluded ECO's citizen suit. The City moved for summary judgment, arguing that ECO's suit should be dismissed

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2. ECO had a right to intervene in the EPA enforcement action, *see* 33 U.S.C. § 1365(b)(1)(B), but declined to do so despite the district court's encouragement.

because the final judgment in the EPA enforcement action precluded re-litigation of the same claims in a citizen suit. Alternatively, the City argued that ECO's claims were mooted by the resolution of the EPA enforcement action. ECO opposed the motion to dismiss, arguing first that the language and statutory scheme of the CWA indicated that the res judicata doctrine and principles of mootness could not be invoked to dismiss a prior-filed citizen suit. Alternatively, ECO argued that neither the elements of res judicata nor the test for mootness had been satisfied.

The district court relied on res judicata to dismiss ECO's citizen suit, rejecting arguments that both the privity and similarity of claims requirements were not met in its case. The court noted that even though "the Fifth Circuit has never considered whether res judicata applies to a citizen enforcement action under the CWA," precedents from other circuits had applied res judicata to citizen suits under similar circumstances. *Envtl. Conservation Org. v. City of Dallas*, 516 F.Supp.2d 653, 657 (N.D.Tex.2007). The district court did not reach the alternative argument regarding mootness. ECO appealed here.

## II. Discussion

### *A. Standard of Review*

We review the district court's grant of summary judgment *de novo*, applying the same standard as the district court. *Greenwell v. State Farm Mut. Auto. Ins.*

*Co.*, 486 F.3d 840, 841 (5th Cir.2007). Summary judgment may be granted only if the pleadings and evidence show that there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The record must be viewed in the light most favorable to the non-moving party; all justifiable inferences will be drawn in the non-movant's favor. *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 759 (5th Cir.2002).

This case also requires us to examine the district court's jurisdiction. The City argues that ECO's claims were moot at the time that the district court entered summary judgment. We review questions of federal jurisdiction *de novo*, including arguments that a case or controversy has become moot. *In re Scruggs*, 392 F.3d 124, 128 (5th Cir.2004). When the district court had no jurisdiction, our authority is not over the merits but exists "merely for the purpose of correcting the error of the lower court in entertaining the suit . . . ." *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir.1998) (citation omitted).

*B. Standing*

"Mootness is 'the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' " *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir.2006) (quoting *U.S. Parole Comm'n v.*

*Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)). If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents. *In re Scruggs,* 392 F.3d at 128. Therefore, before considering any other matters raised by the parties, we are obliged to "resolve the standing question as a threshold matter of jurisdiction." *Cole v. Gen. Motors Corp.,* 484 F.3d 717, 721 (5th Cir.2006).

The U.S. Department of Justice, participating in this appeal as *amicus curiae,* urges us to resolve this case on res judicata grounds and argues that recent Supreme Court precedent permits us to do so, pretermitting the mootness issue. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* __ U.S. __, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007). In *Sinochem,* the Supreme Court held that a federal court may dismiss a case on grounds of *forum non conveniens* although jurisdictional issues remain unresolved. *Id.* at 1190. The Court pragmatically recognized that "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Id.* at 1194. The Third Circuit recently relied on *Sinochem* in affirming the dismissal of a resident alien's petition for habeas corpus on res judicata grounds, although the government also challenged the federal court's jurisdiction to entertain the petition. *Gonzalez-Cifuentes v. I.N.S.,* 253 Fed.Appx. 173, 175 & n. 2 (3d Cir.2007) (unpublished).

We recognize that, in some limited instances, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem*, 127 S.Ct. at 1191 (internal quotation marks omitted). However, we do not think this is one of those instances. In this case, the res judicata analysis is no less burdensome than the standing inquiry. ECO argues that the common law doctrine of res judicata cannot be applied to CWA citizen suits, and there is some precedent to that effect. *See Sierra Club v. Coca-Cola Corp.*, 673 F.Supp. 1555 (M.D.Fla.1987). The City points to later authority that disagrees. *See EPA v. City of Green Forest*, 921 F.2d 1394, 1404 (8th Cir.1990). Even were we to resolve that argument in the City's favor, we would still face an apparent circuit split regarding the proper "privity" analysis in the context of determining the preclusive effect of an EPA-negotiated consent decree on a prior-filed CWA citizen suit. *Compare Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743 (7th Cir.2004) (satisfaction of res judicata "privity" element requires showing of "diligent prosecution") *with City of Green Forest*, 921 F.2d at 1394 (applying res judicata without any discussion of "diligent prosecution"); *see Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473 (6th Cir.2004) (expressly rejecting "diligent prosecution" requirement when applying res judicata to a prior-filed Clean Air Act citizen suit).

This is not "a textbook case for immediate [res judicata] dismissal." *Sinochem*, 127 S.Ct. at 1194. Therefore, we turn to our threshold consideration: was the district court bound to dismiss ECO's suit as moot?

*C. Mootness Analysis*

*1. A citizen suit may be dismissed as moot*

Congress enacted the CWA with the express purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among the myriad of mechanisms for achieving this goal, Congress empowered private citizens to bring suit in federal court against alleged violators of the Act. 33 U.S.C. § 1365. Under the CWA citizen-suit provision, federal courts are authorized to enter injunctions and assess civil penalties, payable to the United States Treasury, against any person found to be in violation of "an effluent standard or limitation" under the Act. § 1365(a); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 175, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The citizen-suit provision is a critical component of the CWA's enforcement scheme, as it "permit[s] citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987).

However, Congress placed some limitations on the commencement of citizen suits under the CWA. First, a citizen may not commence suit prior to sixty days after giving notice of the alleged violation to the EPA, the State, and the alleged violator. § 1365(b)(1)(A). Second, no citizen suit may be brought if the EPA or State "has commenced and is diligently prosecuting a civil or

criminal action" against the alleged violator. § 1365(b)(1)(B). The Act is silent as to which mechanisms may be invoked to dispense with citizen suits—like ECO's—that have been properly commenced under Section 1365(b).

ECO argues that "courts should not employ judicially-created mootness or res judicata doctrines" to dismiss a properly filed citizen suit because this would conflict with Congress's statutory scheme under the CWA. ECO invokes the canon of statutory construction (*expressio unius est exclusio alterius*) that instructs "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). ECO posits that because Congress imposed certain express limitations on a citizen's right to prosecute a CWA suit, all other methods of limiting that right are excluded. Under ECO's theory, the decision to dismiss a properly commenced citizen suit due to mootness constitutes an impermissible judicial addition to Congress's enumerated limitations on such suits.

ECO's argument is flawed for two reasons. First, the "thing to be done" under Section 1365(b) is the *commencement* of a citizen suit, not the resolution of such a suit. Second, and more importantly, mootness is part of the Article III standing inquiry applicable to all suits filed in federal court. *See Laidlaw*, 528 U.S. at 189-94, 120 S.Ct. 693. Thus, when dismissing a citizen suit as moot, a court does not graft some "judicially-created

doctrine" onto the CWA. Rather, a finding that the "irreducible constitutional minimum of standing" is not satisfied means the court has no constitutional authority to resolve the dispute between the citizen and the alleged violator. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). One court has noted that the citizen-suit "provision confers standing to enforce the Clean Water Act to the full extent allowed by the Constitution." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir.2000) (en banc). The "full extent of the law" does not extend beyond constitutional limits. Accordingly, this court has recognized that developments subsequent to the filing of a citizen suit may moot the citizen's case. *See Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061-65 (5th Cir.1991).[3]

Having established that the jurisdictional mootness inquiry is required in the context of a CWA citizen suit, we turn to an application of mootness principles to ECO's suit.

*2. Standard for determining mootness*

As a general rule, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Carmouche,*

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3. Other circuits have reached this conclusion as well. *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 354-55 (8th Cir.1998); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir.1991); *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 209 (4th Cir.1985).

449 F.3d at 661. A case should not be declared moot "[a]s long as the parties maintain a 'concrete interest in the outcome' and effective relief is available to remedy the effect of the violation . . . ." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir.1998). But a case will become moot where "there are no longer adverse parties with sufficient legal interests to maintain the litigation" or "when the parties lack a legally cognizable interest in the outcome" of the litigation. *In re Scruggs*, 392 F.3d at 128. As the Supreme Court has noted, "it is not enough that a dispute was very much alive when the suit was filed; . . . [t]he parties must continue to have a personal stake in the outcome of the lawsuit." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (citations and internal quotation marks omitted).

ECO argues that, if the EPA-negotiated consent decree can moot its citizen suit, the test for mootness should be the traditional, stringent standard that was applied by this court in *Carr v. Alta Verde Industries.* According to *Carr,* in order to have a case dismissed as moot, "[t]he defendant must demonstrate that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." 931 F.2d at 1062 (quoting *Gwaltney,* 484 U.S. at 66, 108 S.Ct. 376) (some quotation marks omitted; emphasis in original). Under this standard, the party asserting mootness bears the "formidable burden" of showing that its alleged violations of the CWA cannot reasonably be expected to recur. *Laidlaw,* 528 U.S. at 189-90, 120 S.Ct. 693. As such, ECO argues that the City must prove that

the consent decree "actually stops all violations without any likelihood the violations will recur" in order to have its citizen suit dismissed as moot.

However, the test for mootness that ECO urges us to apply is derived from cases in which the defendant argued that its *voluntary* conduct mooted the plaintiff's suit. *See Laidlaw,* 528 U.S. at 189, 120 S.Ct. 693 ("The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct . . . ."); *Carr,* 931 F.2d at 1061-65 (cattle feedlot's voluntary improvements and application for CWA permit did not moot citizen suit). This stringent standard is appropriate when considering voluntary cessations of CWA violations because it "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *Gwaltney,* 484 U.S. at 66, 108 S.Ct. 376 (quotation marks omitted). For example, if we were considering an argument by the City that ECO's claims were moot because the City *voluntarily* hired the requisite number of compliance and monitoring staff or *voluntarily* set aside funds for supplemental environmental projects, we would employ the standard discussed in *Laidlaw* and *Carr* because there would no impediment to the City's laying off the new hires or reallocating the funds after ECO's suit was dismissed.

Far from voluntary, the City's compliance with the terms of its MS4 Permit and the CWA has been compelled by an EPA enforcement action and the resulting court-approved consent decree. Further, the actions that allegedly moot ECO's suit are actions of

third parties (the EPA and a federal court), not those of the City. As such, we would not be relying solely on the City's assurances that it will not "return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Under such circumstances, *Carr*'s stringent test for "voluntary" mootness is inappropriate. Instead, we apply the test that has been endorsed by the Second and Eighth Circuits, under which ECO's claims for relief are moot unless ECO (the citizen-suit plaintiff) proves that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree. *Comfort Lake*, 138 F.3d at 355; *Eastman Kodak*, 933 F.2d at 128.[4]

This standard for determining whether a CWA citizen suit has been mooted by a subsequent government enforcement action respects Congress's intent that citizen suits "supplement rather than . . . supplant government action." *Gwaltney*, 484 U.S. at 60, 108 S.Ct. 376. The primary function of a citizen suit is to spur agency enforcement of law. *See Nat'l Wildlife*

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4. The distinction we draw between the traditional mootness inquiry and the more stringent "voluntary cessation" test is not unique to the circumstances in this case. Federal courts have long-recognized that allegations by a defendant that its voluntary conduct has mooted the plaintiff's case require closer examination than allegations that "happenstance" or official acts of third parties have mooted the case. *See DeFunis v. Odegaard*, 416 U.S. 312, 316-19, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Locke v. Bd. of Pub. Instruction of Palm Beach County*, 499 F.2d 359, 363-64 (5th Cir.1974); *see also Laidlaw*, 528 U.S. at 214, 120 S.Ct. 693 (Scalia, J., dissenting).

*Fed'n v. Hanson,* 859 F.2d 313, 317 (4th Cir.1988) (such suits help "ensure that the agencies fulfill their duties under the CWA responsibly"). That is why the Supreme Court has noted that "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.' " *Gwaltney,* 484 U.S. at 60, 108 S.Ct. 376 (quoting S.Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730).

Were we to employ the stringent "voluntary cessation" standard urged by ECO to these circumstances—where compliance was brought about as the result of an EPA enforcement action and a court-approved consent decree—we would effectively cede primary enforcement authority under the CWA to citizens acting in the role of private attorneys general. Such ceding would discourage defendants in a citizen from entering a consent decree with federal or state enforcement agencies, because defendants would remain exposed to duplicative penalties. *See Gwaltney,* 484 U.S. at 60-61, 108 S.Ct. 376; *Eastman Kodak,* 933 F.2d at 127. Not only might this lead to under-enforcement of the CWA, it would also shift primary responsibility from the expert agencies to the necessarily generalist courts. *Cf. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 579 (5th Cir.1996) (primary regulation of pollution should be by the EPA, not through a federal district court's supervision); *Eastman Kodak,* 933 F.2d at 127.

Further, the "realistic prospect" mootness standard that we employ today comports with Congress's policy

that only "diligent prosecutions" preempt citizen suits. *See* § 1365(b)(1)(B). If a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown. Placing the burden on the citizen-suit plaintiff to demonstrate that his claims are not mooted by the consent decree is also in step with Congressional policy. *See Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir.2007) (noting that the citizen-suit plaintiff bears the burden to demonstrate that an EPA prosecution is not diligent). For these reasons, we adopt the "realistic prospect" test for mootness that has been employed by the Second and Eighth Circuits in this context.

*3. ECO's citizen suit is moot*

We now consider whether ECO can satisfy its burden to show a realistic prospect that the CWA violations alleged in its citizen suit will continue notwithstanding the consent decree. The district court found that the consent decree resolved every violation alleged in the ECO citizen suit. *Envtl. Conservation Org.*, 516 F.Supp.2d at 659 & n. 6. ECO argues that evidence in the record shows that the City is engaging and will continue to engage in violations of its MS4 Permit and the CWA.

ECO relies primarily on an affidavit submitted by Craig T. Maske, a civil engineer with an expertise in water resources whom ECO retained as an expert.

Mr. Maske's affidavit, sworn on November 10, 2006, details various past violations by the City and offers his opinion that these violations will continue. However, Mr. Maske does not mention the consent decree in his affidavit, nor does he offer an explicit opinion that the consent decree will not adequately address the violations discussed therein. Therefore, Mr. Maske's affidavit does not address the critical fact in our mootness inquiry.

Other evidence is said to be found in the depositions of several City employees. This testimony, given in April and May 2006, provides evidence solely of *past* violations by the City. No employee mentions the consent decree or offers any prediction as to whether the decree will address the relevant violations. ECO asks us to infer from the City's "distinct track record of failing to comply with CWA requirements" that these violations will continue and suggests that there is authority for drawing such an inference on summary judgment. *See Orange Env't, Inc. v. County of Orange*, 860 F.Supp. 1003, 1019 (S.D.N.Y.1994). Such an inference requires that the polluter have a poor "track record for complying with [state agency] compliance orders . . . ." *Id.* The only compliance order entered against the City is the one that is the focus of this appeal. We refuse to draw the inference that the *Orange* court drew under such dissimilar circumstances.

After reviewing the consent decree and comparing it to ECO's complaint, we agree with the district court that it addresses every MS4 Permit and CWA violation

alleged in ECO's citizen suit. ECO has not pointed to specific facts on appeal that would support an inference that the City will continue to engage in violations that were alleged in ECO's citizen suit but not addressed by the consent decree. *See Sedgwick James*, 276 F.3d at 759 ("Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial."). For these reasons, ECO cannot show a realistic prospect that any of the violations alleged in its citizen suit will continue notwithstanding the consent decree. As we explain below, ECO's claims for both injunctive relief and civil penalties are moot.

*(a) Injunctive relief*

The consent decree requires the City to take steps to correct the planning, staffing, monitoring, and compliance deficiencies that resulted in the violations alleged in ECO's suit. ECO argues there is no mootness as to injunctive relief because the immediate cessation of all violations has not been ordered.

Even had ECO prevailed on its citizen suit, the district court was not bound to order the immediate cessation of all violations. Traditional equitable principles control the decision to enter an injunction, under which the court has broad discretion to balance the interests of the parties. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY LANE, FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed.1990). The district court

might even have denied injunctive relief altogether. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 314-20, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). But even if some form of injunctive relief were ordered, the district court might have denied ECO's request for immediate relief if the more practical solution was a permanent injunction that mandated a cessation of violations over a period of time. *See e.g., Reserve Mining Co. v. EPA,* 514 F.2d 492, 537-40 (8th Cir.1975); *N.Y. Coastal Fishermen's Ass'n v. N.Y.C. Dep't of Sanitation,* 772 F.Supp. 162, 169-70 (S.D.N.Y.1991). We also note the practical difficulty of enforcing an immediate cessation of violations that occur, in large part, due to rainfall over the City. Thus, as applied to this case, the "realistic prospect" test considers whether violations will "continue" in the sense that the violations will not be cured even after the remedial plan imposed by the consent decree has been fully implemented in accordance with reasonable timetables.[5]

The consent decree achieved some court-ordered mandatory relief that is injunctive in nature. Because ECO is not *entitled* to any particular form of injunctive relief under the CWA—and, therefore, was not guaranteed to achieve any other form of relief in its citizen suit than that imposed under the consent decree-its claims for injunctive relief are moot.

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5. Under the consent decree, all mandatory planning and any construction must be completed within three to four years. This is not an unreasonably lengthy period for requiring compliance. *Cf. Friends of Milwaukee's Rivers,* 382 F.3d at 760-61 (eight-year deadline for completion of remedial construction projects was permissible).

*Appendix Exhibit A*

*(b) Civil penalties*

There is some authority that even where a defendant's *voluntary* acts of compliance are sufficient to moot a citizen's request for injunctive relief, those voluntary acts will not necessarily moot a related claim for civil penalties. *Comfort Lake,* 138 F.3d at 356; *Carr,* 931 F.2d at 1065 n. 9. This is not a case of voluntary compliance. This appeal requires us to determine whether acts of compliance that have been *compelled* by an EPA-negotiated consent decree can moot a citizen's claim for civil penalties.

First, it is significant that the consent decree imposed $800,000 in civil penalties on the City. This does not represent the maximum penalty permissible under the statute. *See* 33 U.S.C. § 1319(d). However, even in the event of a successful citizen suit, the district court is not bound to impose the maximum penalty afforded under the statute. In fact, the district court is required to consider a myriad of factors, some of which are mitigating in nature, when determining the appropriate civil penalty under the CWA. § 1319(d); *see Cedar Point,* 73 F.3d at 576 (district court did not abuse its discretion by imposing $186,070 civil penalty even though maximum permissible penalty was $20,225,000). Thus, the penalties imposed by the consent decree are arguably the same penalties that ECO could have achieved in a successful citizen suit.

More importantly, ECO assumed the role of private attorney general in the pursuit of its citizen suit. Any

penalty that it achieved would have been paid into the United States Treasury. After ECO initiated its citizen suit, the United States government initiated its own enforcement action and extracted *some* civil penalties from the City. The resulting consent decree (approved by the U.S. Department of Justice) represents the federal government's discretionary resolution of the level of penalty needed for the same environmental concerns raised by ECO. A private attorney general is no longer needed to raise the issue of the proper civil penalty. That ECO might have sought stiffer penalties against the City does not change the result; ECO is not permitted to upset the primary enforcement role of the EPA by seeking civil penalties that "the Administrator chose to forego . . . ." *Gwaltney,* 484 U.S. at 61, 108 S.Ct. 376. The appropriate government agencies have exercised their discretion to extract some penalties from the City and forego others. By proceeding with its citizen suit, ECO could accomplish nothing other than to revisit the government's "dispositive administrative settlement." *Eastman Kodak,* 933 F.2d at 127; *compare Atlantic States Legal Found. v. Pan Am. Tanning,* 993 F.2d 1017, 1022 (2d Cir.1993) (distinguishing *Eastman Kodak* where settlement "did not cover all of the violations plaintiffs allege[d] and assessed small fines of only $6,600"). For these reasons, ECO's claim for civil penalties is moot.

## III. Conclusion

Underlying our decision today is the recognition that ECO's concrete interest in the outcome of the litigation was the public's interest, not an interest specific to ECO or its members. *See Green Forest,* 921 F.2d at 1404-05. Once the EPA filed an enforcement action and secured a consent decree that adequately addressed the same violations alleged in ECO's suit, the public interest was vindicated to the full extent of ECO's ability to vindicate it. When nothing was left for ECO to accomplish, it no longer had a stake in the litigation.

Because the district court's consent decree in the EPA's enforcement action addressed all of the CWA violations alleged in ECO's citizen suit, extracted reasonable civil penalties, and mandated that the City undertake significant corrective measures, ECO's citizen suit became moot when the consent decree was entered. Accordingly, the district court's judgment in this case was rendered without jurisdiction and must be vacated. *Goldin v. Bartholow,* 166 F.3d 710, 718 (5th Cir.1999).[6]

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6. We are aware that ECO has appealed the denial of its request for costs under Section § 1365(d). *Envt'l Conservation Org. v. City of Dallas,* No. 07-11247 (5th Cir. filed Dec. 10, 2007). Our opinion today should not be read to express any position on the merits of that appeal. *See Murphy v. Fort Worth Indep. Sch. Dist.,* 334 F.3d 470, 471 (5th Cir.2003) (a determination of mootness does not preclude an award of attorneys' fees).

*Appendix Exhibit A*

We VACATE the district court's summary judgment in favor of the City and REMAND this case to the district court with instructions that ECO's citizen suit be dismissed as moot.

## APPENDIX EXHIBIT B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION FILED APRIL 26, 2007

## IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

No. 3-03-CV-2951-BD

The ENVIRONMENTAL CONSERVATION ORGANIZATION,

Plaintiff,

v.

The CITY OF DALLAS,

Defendant.

## MEMORANDUM OPINION AND ORDER

Defendant the City of Dallas ("the City") has filed a motion for summary judgment in this citizen enforcement action brought under section 505 of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* For the reasons stated herein, the motion is granted.

*Appendix Exhibit B*

I.

The City operates a municipal separate storm sewer system ("MS4") that collects and discharges storm water into the Trinity River and its tributaries. (*See* Def. MSJ App. at 279). In March 1997, the City obtained a storm water discharge permit from the United States Environmental Protection Agency ("EPA"). (*Id.* at 39). As required by the permit, the City created and implemented a comprehensive storm water pollution and management program ("SWMP") designed to reduce the discharge of pollutants into the MS4. (*Id.* at 71-272). The permit became effective on May 1, 1997 and expired at midnight on April 30, 2002. (*Id.* at 39). A renewal permit was issued on February 22, 2006 and remains in effect today. (*Id.* at 279).[1]

On December 9, 2003, The Environmental Conservation Organization ("ECO"), a Texas non-profit environmental watch group, sued the City in federal district court for CWA violations ("the ECO Litigation"). Succinctly stated, ECO alleges that the City has all but ignored its obligations under the SWMP by failing to develop and implement an effective program to monitor

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1. In October 2001, the City applied for a renewal storm water discharge permit. However, a new permit was not issued until February 22, 2006. (Def. MSJ App. at 279). In the interim, the City continued to operate its municipal separate storm water system under the expired permit as allowed by federal law. *See* 40 C.F.R. § 122.6.

and reduce the discharge of pollutants into the MS4. (*See* Plf. Orig. Compl. at 8, ¶¶ 29-34).[2] A list of more than 150 specific violations of Sections 4.1-4.20 of the SWMP is included as an attachment to ECO's complaint. (*Id.*, Attch. A).

On February 6, 2004, the EPA issued a Compliance Order citing the City for multiple violations of its SWMP, including many of the violations made the basis of the ECO Litigation. (Def. MSJ App. at 610-52). Among the violations identified in the Compliance Order are:

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2. ECO also accused the City of regularly discharging pollutant-laden water from its various facilities without a National Pollutant Discharge Elimination System ("NPDES") permit or a Texas Pollutant Discharge Elimination System ("TPDES") permit, in violation of such permits, or at levels far exceeding any discharge permitted under state and federal law. (*See* Plf. Orig. Compl. at 5-7, ¶¶ 20-28). Those claims were dismissed without prejudice for failure to provide adequate notice in accordance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3. *The Environmental Conservation Organization v. The City of Dallas*, No. 3-03-CV-2951-BD, 2005 WL 1771289 (N.D.Tex. Jul.26, 2005).

*Appendix Exhibit B*

| SWMP Task or Subtask No. | Description of Alleged Violation |
|---|---|
| 4.8.1<br>4.8.2 | Failure to complete the following required individual tasks as scheduled to reduce to the maximum extent practicable, pollutants discharged from the MS4 associated with the application of pesticides, herbicides, and fertilizer, which include controls such as educational activities, permits, and certifications for applications in public right-of-ways and at municipal facilities. |

| **Individual Task** | **Completion Date** |
|---|---|
| Task 1 | Years 1-5 (1998-2002) |
| Task 2 | Years 1-5 (1998-2002) |

| SWMP Task or Subtask No. | Description of Alleged Violation |
|---|---|
| 4.10.2<br>4.10.3<br><br>4.10.4<br>4.10.6<br>4.10.9 | Failure to complete the following required individual tasks as scheduled to conduct ongoing field screening activities.<br><br>**Individual Task** — **Completion Date**<br>Task 2 — Years 1-2 (1998-1999)<br>Task 3 — Years 1-5 (1998-2002)<br>Task 4 — Years 1-5 (1998-2002)<br>Task 6 — Years 1-2 (1998-1999)<br>Task 9 — Years 1-5 (1998-2002) |
| 4.12.1.1<br>4.12.1.2<br>4.12.1.3<br><br>4.12.1.4 | Failure to complete the following required individual tasks as scheduled to prevent, contain, and respond to spills that may discharge and flow into the MS4. |

*Appendix Exhibit B*

| SWMP Task or Subtask No. | Description of Alleged Violation | |
|---|---|---|
| 4.12.1.5 | **Individual Task** | **Completion Date** |
| 4.12.1.6 | Task 1 | |
| 4.12.1.7 | Subtask 1 | Years 2-5 (1999-2002) |
| 4.12.1.8 | Subtask 2 | Years 2-5 (1999-2002) |
| 4.12.1.9 | Subtask 3 | Years 2-5 (1999-2002) |
| 4.12.3.1 | Subtask 4 | Years 2-5 (1999-2002) |
| 4.12.3.2 | Subtask 5 | Years 2-5 (1999-2002) |
| | Subtask 6 | Years 2-5 (1999-2002) |
| | Subtask 7 | Years 2-5 (1999-2002) |
| | Subtask 8 | Years 2-5 (1999-2002) |
| | Subtask 9 | Years 2-5 (1999-2002) |
| | Task 3 | |
| | Subtask 1 | Year 3 (2000) |
| | Subtask 2 | Years 3-5 (2000-2002) |

| SWMP Task or Subtask No. | Description of Alleged Violation |
| --- | --- |
| 4.14.3.2<br>4.14.3.3 | Failure to complete the following required individual tasks as scheduled to implement educational activities, public information activities, and other activities to facilitate the proper management and disposal of used oil and toxic materials. |

| Individual Task | Completion Date |
| --- | --- |
| Task 3 | |
| Subtask 2 | Years 1-5 (1998-2002) |
| Subtask 3 | Years 1-5 (1998-2002) |

| SWMP Task or Subtask No. | Description of Alleged Violation |
| --- | --- |
| 4.15.2 | Failure to complete the following required individual tasks as scheduled with regard to programs and/or controls which are currently implemented to limit infiltration of seepage from the municipal sanitary sewers to the MS4.<br><br>**Individual Task**<br>Task 2<br><br>Failure to monitor and test for the presence of wastewater I/I and overflows and direct detected problem areas to the Water Utilities Department for identification and correction under the NPDES Permit No. TX0047830, as specified in the revised SWMP. |

| SWMP Task or Subtask No. | Description of Alleged Violation |
|---|---|
| 4.19.5<br>4.19.6 | Failure to complete the following required individual tasks, as scheduled, to mitigate the adverse environmental impact of storm water runoff by developing Best Management Practice (BMP) requirements. |

| Individual Task | Completion Date |
|---|---|
| Task 5 | Years 1-5 (1998-2002) |
| Task 6 | Years 1-5 (1998-2002) |

(*Id.* at 631, ¶ 57 & 640-46). Following protracted negotiations, the City and the EPA settled their differences and entered into a Consent Decree which resolves, *inter alia*, "the violations alleged in the Compliance Order through the date of lodging." (*Id.* at 356, ¶ 71). Under the terms of the settlement, the City agreed to pay $800,000 in civil penalties, to undertake two supplemental environmental projects at a cost of at least $1.2 million, to establish an environmental management system, to adhere to minimum staffing and inspection requirements, and to pay stipulated penalties for future violations of the CWA. (*Id.* at 744-50, 755). On May 10, 2006, the United States of America, joined by the State of Texas, filed suit to obtain judicial approval of their settlement with the City and entry of the Consent Decree ("the EPA Litigation"). Although ECO did not oppose entry of the Consent Decree, it did complain to the EPA and Texas authorities that the terms of the settlement were inadequate in various respects. (*Id.* at 657-60). On August 28, 2006, the court determined that the Consent Decree was fair, reasonable, and consistent with the purposes of the CWA, and entered the decree as its final judgment in the EPA Litigation. (*See id.* at 774).

The City now moves for summary judgment in the ECO Litigation on the ground that the Consent Decree is res judicata of all claims asserted in that case.[3] The

3. The City also argues that the claims alleged by ECO in its complaint, which are based on violations of a permit that expired in 2002, are moot. Because the City is entitled to summary judgment on its res judicata defense, the court need not address this alternative ground for dismissal.

issues have been fully briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Where, as here, a party seeks summary judgment on an affirmative defense, the movant must establish "beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986) (emphasis in original). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir.1992). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir.1993).

A.

The rule of res judicata, or claim preclusion, "bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *Test Masters Educational Services, Inc. v. Singh*, 428

F.3d 559, 571 (5th Cir.2005), *cert. denied*, 547 U.S. 1055, 126 S.Ct. 1662, 164 L.Ed.2d 397 (2006). The test for res judicata has four elements: (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action; (2) the judgment in the prior case was rendered by a court of competent jurisdiction; (3) there has been a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits. *Id.; see also Ellis v. Amex Life Insurance Co.*, 211 F.3d 935, 937 (5th Cir.2000). Although the Fifth Circuit has never considered whether res judicata applies to a citizen enforcement action under the CWA, those courts that have considered the issue have concluded that the principles of res judicata apply to citizens suits, like the one brought by ECO, where the government subsequently files suit and obtains a judgment based on the same violations alleged in the earlier-filed citizen enforcement action. *See, e.g. Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 752 (7th Cir.2004), *cert. denied*, 544 U.S. 913, 125 S.Ct. 1593, 161 L.Ed.2d 293 (2005); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 774 (9th Cir.1994); *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir.1991); *United States v. City of Green Forest*, 921 F.2d 1394, 1403-05 (8th Cir.), *cert. denied*, 502 U.S. 956, 112 S.Ct. 414, 116 L.Ed.2d 435 (1991).

*Appendix Exhibit B*

B.

ECO first argues that a citizen suit cannot be dismissed on res judicata grounds where the government fails to initiate an enforcement proceeding within 60 days of receiving notice of the alleged CWA violation. In support of this argument, ECO relies on the federal statute authorizing citizen enforcement actions, 33 U.S.C. § 1365, which provides, in pertinent part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation[.]

33 U.S.C. § 1365(a)(1). Subsection (b) prohibits the filing of a citizen suit:

> prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order[.]

*Id.* § 1365(b)(1)(A). According to ECO, Congress imposed this 60-day notice requirement "as the way to

balance the potential tensions between allowing citizens to sue and preferring the government to do so." (Plf. MSJ Resp. Br. at 3). Because the government did not act within the 60-day waiting period, ECO believes that it may continue to prosecute its citizen suit, notwithstanding the subsequent enforcement action filed by the government which has been resolved by entry of a consent decree.

The court cannot accept ECO's broad reading of section 1365. Neither the statute itself nor the cases cited by ECO in its summary judgment response address the preclusive effect of a consent decree entered in a government enforcement action that was filed *after* the citizen suit was initiated. Section 1365, by its terms, specifies the jurisdictional prerequisites for filing a citizen enforcement action under the CWA. Similarly, the cases cited by ECO deal with standing, statutory preclusion, and mootness. None of those cases even mention, much less discuss, the res judicata implications of a consent decree entered in a government enforcement action. *See Altamaha Riverkeepers v. City of Cochran,* 162 F.Supp.2d 1368, 1373 (M.D.Ga.2001); *Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc.,* 817 F.Supp. 1164, 1171-73 (D.N.J.1993); *Natural Resources Defense Council, Inc. v. Loewengart & Co.,* 776 F.Supp. 996, 1000 (M.D.Pa.1991).[4] The court is

4. The court notes that in two of those cases, *Natural Resource Defense Council* and *Altamaha Riverkeepers,* res judicata would not apply in any event because the consent decree had not yet been entered by the court and was not a final judgment.

unaware of any authority which would prevent application of the well-settled principles of res judicata to citizen suits brought under the CWA.

C.

Having determined that the City may assert a res judicata defense, the elements of the defense must be examined. ECO tacitly concedes the second and third elements-that the Consent Decree was rendered by a court of competent jurisdiction and constitutes a final judgment on the merits. Instead, ECO argues that: (1) the privity requirement is not met because the government did not "diligently pursue" its case; and (2) the Consent Decree does not resolve all of the claims raised in the citizen suit. (Plf. MSJ Resp. Br. at 22-25). Assuming that diligent prosecution is required,[5]

5. The Seventh Circuit is the only appellate court to suggest that "diligent prosecution" is a necessary element of privity. *See Friends of Milwaukee's Rivers*, 382 F.3d at 760 (notwithstanding the heavy presumption in favor of diligent prosecution by the government, the court must examine whether the consent decree was "capable of requiring compliance with the Act and [was] in good faith calculated to do so"). Other courts have expressly held that the "diligent prosecution" requirement only limits the ability of a citizen to file suit after "the [EPA] Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." *See* 33 U.S.C. § 1365(b)(1)(B). "Diligent prosecution" does not appear to be a factor in determining whether res judicata precludes a citizen

(Cont'd)

government prosecutions under the CWA are heavily presumed to be "diligent." *See, e.g. Friends of Milwaukee's Rivers,* 382 F.3d at 760; *Karr v. Hefner,* 475 F.3d 1192, 1197-98 (10th Cir.2007); *Citizens Legal Environmental Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-C-SJ, 2000 WL 220464 at *12 (W.D.Mo. Feb.23, 2000) (citing cases); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F.Supp. 1300, 1324 (S.D.Iowa 1997). Indeed, the court in *Premium Standard Farms* noted that absent unique circumstances, "a consent order should be viewed as sufficient in itself to satisfy the requirement of diligent prosecution." *Premium Standard Farms,* 2000 WL 220464 at *18, *quoting Sierra Club v. SCM Corp.*, 572 F.Supp. 828, 831 n. 3 (W.D.N.Y.1983). The court concludes, as a matter of law, that the EPA and the State of Texas diligently prosecuted their enforcement action against the City as evidenced by the comprehensive relief obtained in the Consent Decree.

In order to determine whether the ECO Litigation and the EPA Litigation involve the same claims or causes of action, the court uses a "transactional test." As the Fifth Circuit explained:

> Under the transactional test, a prior judgment's preclusive effect extends to all

(Cont'd)

from continuing to prosecute an earlier-filed enforcement action after entry of a consent decree in a subsequent case brought by the government. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473 (6th Cir.2004); *City of Green Forest,* 921 F.2d at 1403-04.

> rights of the plaintiff with respect to all or any part of the transaction, or series of connected transactions, out of which the original action arose. What grouping of facts constitutes a "transaction" or a "series of transactions" must be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. If a party can only win the suit by convincing the court that the prior judgment was in error, the second suit is barred.

*Test Masters*, 428 F.3d at 571 (internal citations omitted). The critical issue is whether the two suits are based on the "same nucleus of operative facts." *Id.; see also Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir.2004). ECO argues that the complaint in the EPA Litigation does not mention sections 4.8, 4.10, 4.12, 4.14, 4.15, or 4.19 of the SWMP. While this may be true, ECO ignores the fact that the Consent Decree expressly resolves "the violations alleged in the Compliance Order through the date of lodging." (Def. MSJ App. at 356, ¶ 71). The Compliance Order, which is attached as an appendix to the Consent Decree, specifically addresses violations of sections 4.8, 4.10, 4.12, 4.14, 4.15, and 4.19. ( *Id.* at 640-44, 646). In addition, the City has submitted a detailed summary explaining how the Consent Decree resolves each and every violation alleged in the ECO

Litigation. (*Id.*, 781-827).[6] Consequently, ECO is precluded from litigating the same claims in a citizen suit. *See Premium Standard Farms*, 2000 WL 220464 at *7, *citing* 18A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4443 at 386-87 (1981) *and Larken, Inc., v. Wray*, 189 F.3d 729, 733 n. 9 (8th Cir.1999).

## CONCLUSION

The City's motion for summary judgment [Doc. # 101] is granted on its affirmative defense of res judicata. The court will dismiss all remaining claims in this action by separate judgment filed today.

SO ORDERED.

DATED: April 26, 2007

s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

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6. In its complaint, ECO alleges that the City violated Subtask 4.10.1 of the SWMP by "fail[ing] to institute a citizen report telephone number" and Subtask 4.14.4 by "fail[ing] to initiate [a] public information campaign for HHW issues." (*See* Plf. Orig. Compl., Attch. A at 13, 15). Neither the Compliance Order nor the complaint filed in the EPA Litigation specifically refer to these subtasks. However, as the City explains in its summary, Subtask 4.10.2, which requires the City to institute a citizen observer program, includes the creation of a citizen report telephone number. (*See* Def. MSJ App. at 812). Subtask 4.10.2 is referenced in the Compliance Order. (*Id.* at 641). The City also points out that the SWMP does not include a Subtask 4.14.4, nor is there any corresponding requirement that matches ECO's description. (*See id.* at 817). ECO offers no evidence to the contrary.